United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1006
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1006

Case No. 1140: INGGS

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President; Mr. Spyridon Flogaitis;

Whereas at the request of Patricia M. Inggs, a former staff member of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2000 the time-limit for the filing of an application with the Tribunal;

Whereas, on 23 May 2000, the Applicant filed an Application containing pleas which read as follows:

"MAY IT PLEASE the presiding member to agree to an oral proceeding in this case.

MAY IT FURTHER PLEASE THE TRIBUNAL:

[...]

3. To quash the binding decision of the Commissioner-General, as communicated to the Applicant in a letter dated 22 December 1999, and to draw the necessary legal conclusions therefrom, namely, to reinstate the Applicant, or to pay her the termination indemnity and give her the 30 days' written notice to which she is entitled under the applicable statutory and regulatory provisions;

4. To award the Applicant an indemnity consisting of one year's gross salary (including benefits) for the material and moral injury which she has sustained;

5. To award the Applicant, as costs, a sum payable by the Respondent, to be determined at the conclusion of the proceeding."

Whereas the Respondent filed his Answer on 31 October 2000;

Whereas the Applicant filed Written Observations on 28 May 2001, and on 26 June 2001, the Respondent provided his comments thereon;

Whereas on 25 July 2001, the Tribunal decided that no oral proceedings would be held in the case.

Whereas the facts in the case are as follows:

The Applicant joined UNRWA as an International staff member in 1974, but resigned in 1978 when UNRWA Headquarters moved from Beirut to Vienna. Effective 24 February 1985, the Applicant re-entered the service of UNRWA as a Senior Secretary at the G-5 level on a one-year fixed-term appointment in the Field Office in Amman, Jordan. Effective 24 February 1987, the Applicant was granted an indefinite appointment and effective 1 April 1991, she was reassigned to Vienna as a Senior Secretary.

On 24 February 1993, Staff Bulletin No.16/93, entitled "Inter-Organization Movement of International Staff" was issued. This Staff Bulletin provided that should an international staff member leave UNRWA in order to join another United Nations organization or peace-keeping operation, the staff member would only be released on secondment or loan on reimbursable basis "on the clear understanding that by accepting the secondment/loan, the staff member has concurrently resigned from UNRWA's service with effect from close of business on the date of cessation of his/her service with the receiving UN organization".

On 8 June 1994, the Officer-in-Charge, Recruitment and Staff Development, UNRWA, Vienna, was advised by the Office of Human Resources Management (OHRM), that the Applicant had been selected for a one-year assignment to the United Nations Iraq Kuwait Observation Mission (UNIKOM). OHRM requested that UNRWA approve the arrangement and advise as to whether the Applicant would be reabsorbed at the end of the assignment. The fax contains the following handwritten notation: "I informed [the Applicant] that she could not return to UNRWA if she accepted the assignment ..." In its reply of 16 June 1994, UNRWA confirmed that the Applicant had accepted the offer of a one-year assignment with UNIKOM, and agreed to release her "subject to the condition that she resign from UNRWA with effect from the date of completion of her UNIKOM mission".

The Applicant was on mission with UNIKOM on a reimbursable loan arrangement from 12 August 1994 until 30 September 1998.

On 15 August 1996, Staff Bulletin No. 32/96 was released. It stated in part:

> "The Commissioner-General has decided that, with immediate effect, all international staff members of UNRWA who wish to serve with another organization of the United Nations common system for a period of time in order to enhance their skills should be encouraged to do so. To that end, Agency staff will retain the right of return to a post of commensurate responsibility and grade to that which he/she vacated upon departure".

On 3 June 1998, the Chief, Personnel Management and Support Service, Department of Peacekeeping Operations (PMSS/DPKO) asked UNRWA to confirm the re-absorption of the Applicant in the event she completed her assignment. In reply, on 8 June 1998, UNRWA confirmed that, as stated on 16 June 1994, the Applicant would separate from UNRWA "with effect from the date of completion of her UNIKOM Mission assignment".

On 16 September, UNRWA sent a fax to the Chief, PMSS/DPKO, asking whether he intended to extend the Applicant's mission assignment as otherwise she would have to be separated two years prior to her retirement, there being no post available for her at UNRWA. In his reply of 21 September 1998, the Chief, PMSS/DPKO, indicated that the Applicant would not be extended beyond 30 September.

On 27 September 1998, the Applicant was so informed by the Officer-in Charge, Administration and Human Resources, UNRWA, Gaza, and reminded that her release from UNRWA was subject to the requirement that she resign from UNRWA with effect from the date of completion of her UNIKOM mission. On the same day, the Head, International Personnel Section, UNRWA, Gaza, advised the Applicant of her entitlements in connection with her separation from service.

On 28 November 1998, the Chairman, International Staff Association, (C/ISA) wrote to the Director of Administration and Human Resources, UNRWA, Gaza, advising him that he had been consulted by the Applicant about her separation from service and requesting that she be re-absorbed into the Agency in accord with current policies. On 18 February 1999, the Director, Administration and Human Resources replied that it was inappropriate for him to discuss individual cases with the International Staff Association.

By letter dated 15 March 1999, the Applicant requested the Commissioner-General to review the decision not to re-absorb her into the Agency or pay her a termination indemnity. The Commissioner-General replied by letter dated 12 May 1999, that her request could not be entertained since it was received "considerably later than the required time limit".

On 11 June 1999, the Applicant lodged an appeal with the International Staff Joint Appeals Board (JAB). The JAB adopted its report on 2 December 1999. Its findings and conclusions read as follows:

> "**Findings ...**
>
> 17. With regard to receivability the Board considered it appropriate to distinguish between the Appellant's request to rejoin the Agency at the end of her mission assignment with UNIKOM and her request for payment of termination indemnity.
>
> 18. With regard to the Appellant's request to rejoin the Agency at the end of her mission assignment it is obvious that the Appellant chose to deal with the Administration indirectly through the [C/ISA]. The Appellant, as a long serving UN staff member must have been aware of the possibility and requirements to lodge an official appeal. If rejoining the Agency had been of critical importance to the Appellant she should (in parallel with the informal conciliation efforts of C/ISA) have at least lodged a *pro forma* appeal in order to comply with the time limits. From the Appellant's contacts with C/ISA she undoubtedly would have been aware of these options. For reasons, which the Board [is] unable to ascertain, the Appellant chose not

to do so, leaving the Board with the impression that rejoining the Agency was not her first priority. The Board therefore concluded that this part of the appeal was not receivable.

19. With regard to the issue of termination indemnity the Board takes a different view concerning receivability. The Board noted that the issue of termination indemnity was not mentioned in the Administration's letter dated 27 September 1998 to the Appellant setting out her entitlements in connection with her separation from the Agency. This issue was only raised for the very first time in the Appellant's letter to the Commissioner-General dated 15 March 1999 ... The Board got the impression from the available documents that the Appellant was probably not aware that, under the terms of her temporary indefinite contract, that she was entitled to payment of termination indemnity, and may only have become aware of this during the course of her discussions with C/ISA or otherwise. As there has *not* been an explicit refusal by the Administration to pay a termination indemnity and as it seems likely that the Appellant was not aware of the entitlement, the Board concludes that it should interpret the Appellant's raising of the issue in her letter of 15 March 1999 to the Commissioner-General as a claim for an entitlement under staff rule 103.18, dealing with '*Retroactivity of Payments* ... The Board feels that the staff member is essentially making a retroactive claim which she is entitled to do under staff rule 103.18 and that this part of the appeal is therefore receivable.

20. The Board noted that the Appellant, a long serving UN staff member with a temporary indefinite contract, went on mission to UNIKOM at a time when the Agency's policy on Inter-Organization Movement of International Staff as described in Staff Bulletin 16/93 (*i.e. the 'Acar Policy'*) was in effect. The Board also noted that this policy and the related practice has since been changed on several occasions. From its own observations and fact-finding the Board is aware of at least five cases, since the introduction of the "*Acar Policy*', where staff members have been reabsorbed by the Agency; in at least one case a post was even created. The Board is also aware that in some of these cases, including the present case, the concerned staff members were not asked to sign what has become commonly known as the *'Suicide Note'*. From that perspective the Board takes the view that the Appellant's separation cannot be considered as a voluntary resignation from the Agency's services and therefore, *prima facie*, there seems to be an entitlement to payment of termination indemnity under International staff regulation 9.3. The Board also noted that the staff member does not appear to have been given the thirty days written notice as is also required by this staff regulation.

Conclusions:

21. The Board concludes that the part of the appeal, which deals with the Agency's decision not to reabsorb the Appellant into the Agency, is not receivable.

22. The Board concludes that the part of the appeal, which deals with the non-payment of termination indemnity is receivable.

23 Accordingly, the Board invites the Administration to explain the reasons why a termination indemnity was not paid and why the Appellant was apparently not given the required thirty days written notice."

On 22 December 1999, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her that he agreed with the conclusions of the JAB regarding the receivability of the appeal and dismissed this aspect of the appeal based on this finding. The letter continued:

> "With regard to your claim for payment of termination indemnity the Board ... interpret[ed] the raising of this issue in your letter of 15 March 1999 as a claim for an entitlement under International staff rule 103.18 (Retroactivity of Payments). I do not agree with this finding. [In the letter from the Head, International Personnel Section, UNRWA, Gaza,] of 27 September 1998 ... no termination indemnity was mentioned ... because the Administration considered that you had resigned at the end of completion of your UNIKOM mission ... As stipulated in International staff regulation 9.4 (e) (i) in case of resignation the Administration shall not pay a termination indemnity ... You did not seek review of the decision to treat your termination as resignation within the prescribed time-limits and equally did not seek within the time-limits, a review of any decision which was a necessary consequence of the decision to treat your termination as resignation. Accordingly, I do not agree with the Board's conclusion that the part of the appeal which deals with the non-payment of termination indemnity is receivable. As this aspect of the appeal did equally not comply with the time limits, I have rejected this finding and also dismissed this aspect of the appeal.
>
> ..."

On 23 May 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Tribunal is competent to hear the case since the application is not time-barred due to the intervention of the C/ISA and the delay of the Administration in responding.

2. The Administration has committed errors of law and violated the principles of good faith.

3. The Administration's decision to separate the Applicant from service

caused the Applicant great financial and moral damage.

4. The Applicant's right to re-absorption by UNRWA should have been governed by the policy change introduced by UNRWA on 15 August 1996, granting a right of return for staff members on loan to other United Nations organizations.

Whereas the Respondent's principal contentions are:

1. The application is time-barred and is not receivable in its entirety.

2. The Applicant's claim for salary in lieu of written notice is not receivable by the Tribunal.

3. If the Application or any part thereof is deemed receivable by the Tribunal, the case should be remanded to the JAB for consideration on the merits.

4. The Applicant has failed to demonstrate any non-observance of her contract or of the terms of her appointment with UNRWA.

The Tribunal, having deliberated from 28 June to 26 July 2001, now pronounces the following judgement:

I. The Tribunal considers that the main issues in this case are the requests of the Applicant to be reinstated or granted a termination indemnity.

II. First, the Tribunal examines the request of the Applicant to be reinstated in the Agency. The Tribunal notes that the JAB's conclusion that the Applicant's request was not made within the time limits prescribed by the Staff Rules and, as such, was time-barred, and that it found no exceptional circumstances justifying her non-compliance with the prescribed time limits.

The Tribunal notes that the intervention of the C/ISA with the Director of Administration and Human Recourses, UNRWA, Gaza, on the Applicant's behalf demonstrates the Applicant's early concern about her future employment. The Applicant argues that her appeal was not time-barred by virtue of this ongoing intervention. The JAB was not persuaded by this argument, and the Tribunal agrees. International staff rule 111.3 (a) prescribes the time

limits within which rights must be exercised. The Applicant cannot assert that she was not aware of this rule. The Tribunal has extensive jurisprudence on this issue. (See Judgement No. 868, *Bekele* (1998).) The proper exercise of her rights would not have excluded concomitant friendly intervention of anyone, including the C/ISA, supporting her case before the competent authorities.

The Tribunal agrees with the JAB's finding that the Applicant "should (in parallel with the informal conciliation efforts of [the Chairman of the International Staff Association]) have at least lodged a *pro forma* appeal in order to comply with the time limits". The Tribunal concludes that the request of the Applicant to be reinstated is time-barred and, consequently, not receivable.

III. The Tribunal comes now to the Applicant's request for a termination indemnity.

The Tribunal takes note that a termination indemnity could be granted only if the Applicant's departure from service was not due to resignation. Therefore, the main legal issue to be determined is whether the separation of the Applicant was due to resignation or termination. Further, in the event the Tribunal finds that her separation was due to termination, it must consider whether her request for a termination indemnity is also time-barred.

IV. The Tribunal notes that, on 24 February 1993, prior to the Applicant's departure on mission, Staff Bulletin No. 16/93 was issued by the Director of Personnel, stating that "because of the increasingly difficult financial climate, the very limited number of international posts and the emergency nature and requirements of its programmes and operations" the Agency had decided that staff members who chose to go on mission had "concurrently resigned from UNRWA's service with effect from close of business on the date of cessation of his/her service with the receiving UN organization".

On 12 August 1994, the Applicant began service with UNIKOM on a reimbursable loan arrangement for a period of one year. At the time the arrangement was made, the Administration informed the Applicant of the above-mentioned policy and apparently asked her to sign a letter of resignation in accordance therewith. There is no evidence, however, that the Applicant actually signed such a letter.

In a memorandum of 16 June 1994, the Officer-in-Charge, Department of Administration and Human Resources, UNRWA, Vienna, confirmed that the Applicant's acceptance of the post with UNIKOM meant resignation from UNRWA "with effect from the date of completion of her UNIKOM mission". The reimbursable loan arrangement was periodically extended until 30 September 1998 by way of letters exchanged between DPKO, UNRWA and UNIKOM. Each letter reiterated that UNRWA would not reabsorb the Applicant at the end of her mission assignment. However there is no evidence that these letters were copied to the Applicant.

On 15 August 1996, before the end of the Applicant's mission with UNIKOM, the Agency reversed its policy, as stated in Staff Bulletin No. 32/96. According to the new rule, an official accepting a reimbursable loan arrangement would "retain the right of return to a post of commensurate responsibility and grade to that which he/she vacated upon departure". The Staff Bulletin was instituted with "immediate effect", and "canceled" and "superseded" Staff Bulletin No. 16/93. As the Applicant never received copies of the above-mentioned letters exchanged between DPKO, UNRWA and UNIKOM, and was therefore unaware of UNRWA's insistence on applying the old policy to her, there was no reason for her to believe that she would not come under the provisions of the new policy.

The Tribunal does not consider that the Applicant's separation from service resulted from her resignation: she did not sign a letter of resignation letter; she was unaware that UNRWA insisted on applying the old policy to her despite the fact that it had enacted, "with immediate effect", a new policy, "canceling" and "superseding" the old one; and, according to a letter of 16 September 1998, from the Officer-in-Charge, Administration and Human Resources, UNRWA, Gaza, she was separated "on grounds of redundancy". Notwithstanding the Respondent's argument that the Applicant's resignation took effect on the date on which she left for her mission assignment, the extended period of time on which the Applicant was on the reimbursable loan arrangement is conceivable only if her contract with UNRWA was ongoing. Had her resignation become effective on the date she left on mission, she would have been without a contract for the entirety of her assignment to UNIKOM.

The Tribunal takes note of International staff rule 109.3 which states, *inter alia*, "[a] staff member resigns who gives to the Agency a written notice of resignation ... A resignation

... is always initiated by a staff member". In the case under consideration, the Applicant submitted no such notice of resignation. (See Judgement No. 874, *Abbas* (1998).) Therefore, the Tribunal finds that the Applicant's separation from service was, in fact, a termination.

V. The Tribunal turns now to the question of whether the Applicant's request for a termination indemnity was time-barred. The Applicant's request for a termination indemnity was first made in a letter to the Commissioner-General dated 15 March 1999. The Tribunal finds this understandable as, until then, she was hoping to be reabsorbed in UNRWA. The Tribunal notes that there was no mention of a termination indemnity in the Administration's letter dated 27 September 1998, which set out the Applicant's entitlements in connection with her separation from service.

The Tribunal agrees with the JAB that the Applicant's request for a termination indemnity is not time-barred under International staff rule 111.3 (a). Furthermore, as found by the JAB, the Applicant's claim could be considered as a retroactive claim, which she is entitled to submit under International staff rule 103.18, dealing with retroactivity of payments. The Tribunal notes that, until 15 May 1999, the Applicant was still attempting - and hoping - to be reinstated. There is no evidence that the Applicant was aware that, under the terms of her temporary indefinite contract, she was entitled to a termination indemnity. Moreover, the Administration had never explicitly refused to pay such an indemnity. Accordingly, as the Applicant never voluntarily resigned from the Agency's services, the Tribunal finds that there is an entitlement to the payment of a termination indemnity under International staff regulation 9.4.

VI. For the foregoing reasons, the Tribunal:

(i) Decides that the Applicant's request to be reinstated in UNRWA is time-barred and therefore not receivable;

(ii) Orders that the decision of the Commissioner-General of 12 May 1999 not to pay the Applicant a termination indemnity be rescinded, and that she be paid such termination indemnity at the rate in effect on the date of her separation from service; and,

(iii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary